



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Not Reportable/Of interest to other judges

Case no: C 543/2022

In the matter between:

**THE SOUTH AFRICAN POLICE
SERVICES**

First Applicant

and

**THE SAFETY & SECURITY SECTORAL
BARGAINING COUNCIL**

First Respondent

MAUREEN DE BEER (N.O.)

Second Respondent

POPCRU obo NOKUTHULA CEKI

Third Respondent

Heard: 19 June 20224

Delivered: 24 February 2025

Summary: (Review application – Arbitrator misconstruing disciplinary charge and ignoring element of intent - No basis laid for arbitrator concluding that dismissal was an unfair sanction – Award set aside)

JUDGMENT

LAGRANGE, JIntroduction

- [1] This is an application to review and set aside an arbitration award in which the arbitrator upheld the substantive fairness of the dismissal of the applicant.

Condonation

- [2] The award was issued on 16 May 2022 and the review application ought to have been launched by 27 June 2022 but was only brought on 7 November 2022, resulting in it being late by over four months.,
- [3] Between 7 June to 7 July 2022 there was a slow but steady accumulation of internal recommendations made within the SAPS bureaucracy to take the award on review. That process ground to a halt from 7 July to 31 August while the matter waited for a decision from the National Commissioner. Why only the National Commissioner could take a decision on whether to review an arbitration award about the dismissal of a junior police official is hard to understand. It begs the question why this is not a matter which is delegated to another senior police officer, especially given all the senior staff who had already considered the merits of the application and recommended it should proceed. The decision itself ought to have been capable of being taken within a week or two of the National Commissioner having had sight of the documents and recommendations. Instead, it languished in the national commissioner's office for nearly eight weeks.
- [4] On 31 August, the review was in the hands of the state attorney, who promptly set in motion the process of obtaining tenders from advocates to bid for the work. Within fourteen days counsel had been appointed, but the process faltered because counsel could not consult on the matter until 30 September owing to diary conflicts between counsel and the state

attorney. Thereafter, counsel could not deal with the application until 17 October and the application was only filed about three weeks later.

- [5] The prolonged delay at the National Commissioner's office was unacceptable as was the added delay of about a month before the counsel, who had tendered for and was awarded the brief, could actually attend to the matter. It should not be necessary to point out that there was also no reason why it should have taken SAPS so long to file the notice of motion and founding affidavit because the grounds of review raised in the founding affidavit can be completely amended when a supplementary affidavit is filed. Consequently, there is no reason to strive for a comprehensive review application when it is initially launched. There is also no reason why, counsel should not have been able to have drafted the founding papers within three weeks of receiving the brief given the provisional nature of the application at that stage.
- [6] All in all, there is a period of nearly three months for which no explanation was forthcoming. If this was the only weighty consideration, it would be arguable there is little reason to condone the delay. However, SAPS did commence its evaluation of the award within about a fortnight of obtaining the award and there is nothing to suggest that there was wilful neglect on the part of SAPS hierarchy or its counsel which led to the delay.
- [7] Despite the unexplained delays, I believe that the merits of the matter warrant the application being heard, but as a mark of the court's displeasure over the inaction in the National Commissioner's office, it is appropriate to award the third respondent the costs of opposing the condonation application. The full evaluation of the merits follows.

The charges and elements of the evidence

- [8] The applicant, Ms N Ceki ('Ceki') was dismissed after being charged and found guilty of 3 forms of misconduct all arising on 16 January 2019, which concerned her interactions with a group of suspects arrested on suspicion that they were implicated in an ATM robbery. At the time, she was the secretary of the Stellenbosch SAPS station OC and was an administrative staff member, not a police member of the SAPS. She was accused of

taking, or attempting to take, the cell phone of one of arrested suspects and of attempting to create an alibi for the suspects, whom she was familiar with. It was alleged, by so doing, that she had interfered with the justice process, prejudiced the interests of the SAPS, and conducted herself in an improper and disgraceful manner in breach of the Public Service Code.

- [9] When the arresting officer, Captain Williams ('Williams') was drafting his arresting statement in the boardroom, she asked what the suspects were arrested for. He testified that when he told her that it related to an ATM theft in Stellenbosch and that the hire vehicle they were driving was visible on CCTV footage, she mentioned that the hire car vehicle allegedly used in the robbery was in Mbekweni the entire day when the robbery took place. Williams said he did not know how she would have come to know such information. Ceki denied mentioning this.
- [10] Williams also testified that she asked if she could get their personal belongings and he told her she could collect their belts and shoelaces, but never said she could take the cell phones. He told her to go to the Community Service Centre ('CSC') where members were busy with the suspects.
- [11] When he subsequently heard that she had still attempted to take the phones, he found that suspicious and, on the instruction of the station commander, he opened a criminal case against her. The criminal case was ultimately dismissed. Williams also testified she had no need to be at the station at the time and was not supposed to be there. Another witness testified that Ceki had accompanied the police and the suspects to the cells, without having any reason to be there and that she had remained at the cells where the suspects were being held.
- [12] Other testimony was led that Ceki came and stood at the entrance of the Person Identification Verification Application ('PIVA') room when the suspects were having their fingerprints taken, and she spoke to them in isiXhosa. She took a cell phone from one suspect but was ordered to hand it back to the investigating team because it was an exhibit in the case. All the SAPS witnesses in the arbitration were puzzled by her interest in the

matter and that she was only interested in taking the cell phone of one of the suspects whereas all four of them had phones.

- [13] When the suspects were removed to the cells, Ceki followed them and stood beneath the cells at the cell window. There was no reason why she would have been hanging around at the PIVA room or the cells. No part of her duties required her to be present.
- [14] Her evidence was that one of the suspects, Mr M Paulos ('Paulos'), had phoned her and said he and the other suspects had been arrested on the way to the airport. He had asked her to come to the police station to find out the reason for their arrest. He asked her to inform their families and arrange a lawyer. Ceki claimed she related this to Williams at the station and that she had been requested to collect their belongings. Williams told her that the vehicle the suspects used was involved in a crime incident and he told her they were in the PIVA room. She found them at the PIVA room and spoke with Paulos, who said they had not been told why they were arrested. She denied standing in the doorway of the PIVA room, which was occupied by Gericke. She also claimed she could not have attempted to take phones from the suspects, as she was standing nine or ten paces from the room. She told Sergeant Van Louw ('Van Louw') she had permission to collect their belongings, and he said she could. She denied mentioning any cell phones or that she followed the suspects when they were taken from the CSC to the cells. She waited until she was given an envelope with glasses and shoelaces in it.
- [15] She agreed that criminal charges were laid against her, but she was acquitted sometime after criminal charges against the suspects were withdrawn. She testified that Paulos had been her "on-off" boyfriend for a decade, and they had resumed the relationship in 2019. She claimed to have been unaware of what he did in his private time, which had nothing to do with her. She was also ignorant that gangs were involved in ATM robberies. She said she would never have asked for the cell phones because she knew the phones would normally be used to gather information and would only be returned on a suspect's release.

The findings of the arbitrator.

[16] The arbitrator found no evidence of procedural impropriety was presented so she could not find that there was any procedural unfairness in the disciplinary process.

[17] The arbitrator summarised the evidence thus:

“[37] In respect of the respondent’s evidence Gericke¹ testified that he saw Ceki taking a cell phone from a suspect. He never mentioned who the suspect was. He was also unable to say what type of cell phone it was. It is also stated that Gericke gave a different version, when he said the suspect reached out to give the cell phone and that he (Gericke) had to intervene, otherwise Ceki would have been in possession of the cell phone. Gericke told Gordon² that Ceki wanted to take a cell phone of a suspect. She was never present when this happened but testified that at the cells Ceki asked for the cell phones again. She felt that Ceki intervened (sic) with their duties. She also confirmed that Ceki followed them to the police cells. Van Louw also testified that he assisted with the escorting of the suspects to the cells; and that Ceki was in between him and the suspects. It was put to Van Louw that he was never mentioned by Gordon or Gericke. Van Louw still insisted that he was there. According to Ceki’s evidence she never took a cell phone, nor did she follow the suspects and the police members to the cells.

[38] The standard of proof that an employee committed misconduct is that of “balance of probabilities”. In respect of the evidence presented a balanced assessment of the credibility, reliability, and probability of the different versions must be given. It is noted that in some respects

¹ Constable L Gericke

² Constable Gordon

Gericke's evidence was contradictory, street mistake of the taking of the phone was concerned. Gordon testified that upon her arrival at the CSC she was informed by Gericke that Ceki intended to take the cell phone of one of the suspects. She also testified that she was not present when the incident occurred. Gordon and Van Louw both testified that Ceki was constantly in the vicinity of them and the suspects up until the time they went to the cells. At the cells Gordon indicated that Ceki again asked about the cell phones. I am satisfied that Gordon was a reliable witness. Although neither Gordon nor Gericke mentioned Van Louw's involvement with the suspects, Van Louw testified about how Ceki was in his way when he tried to assist with the escorting of the suspects to the police cells. He even mentioned that Ceki took offence when he touched her on her arm to get past her. Gordon also mentioned that Ceki followed them to the cells. Van Louw's evidence was basically in respect of Ceki's presence at the police station. I am also satisfied that Van Louw was a credible witness. In taking into account the totality of the evidence of the respondent witnesses, I am satisfied that their testimony supported each other's versions on a balance of probabilities.

39. In her own evidence Ceki indicated that she knew that cell phones were used for investigation purposes. She had no witnesses to support her testimony that she never tried to take a cell phone. She was in a relationship with one of the suspects and could have him as a witness since he was in the PIVA room when the incident occurred. Ceki basically denied all the allegations against her and was not a very credible witness."

[18] The arbitrator concluded it was highly probable that Ceki had attempted to take a cell phone from one of the suspects. However, she also remarked

that no further evidence was led about the cell phones or why they were secured as exhibits and what purpose they served in the investigation of the criminal case against the suspects.

- [19] The arbitrator then turned her attention to whether Ceki had: done something to harm or prejudice the interests of the state; conducted herself in an improper, disgraceful or unacceptable manner, or contravened a code of the service or the public service by interfering with the justice process. She found no evidence was led of any code of the public service which Ceki might have contravened or how she had prejudiced the interests of the SAPS. Ceki's actions had no effect on the arrest of the suspects. Nevertheless, the arbitrator found Ceki's conduct was improper and unacceptable because she used her privileges as an employee at the police station to enter the back of the station and obtain access to the CSC and PIVA room areas. Although she had permission to obtain some items from the suspects, she had no permission to take cell phones from them.
- [20] The arbitrator also accepted that Ceki had told William about the suspects' vehicle being in Mbekweni (a township near Paarl), but there was no evidence that this claim was investigated nor whether it was even relevant to the criminal case against them. It was not even shown that her claim was a lie. No evidence was led to show the suspects were involved in such a robbery, but all he said was that there was video evidence of the vehicle, and it was a rented one. She held that in order to show that Ceki had attempted to create a false alibi it was necessary to show the suspects were involved in the ATM robbery.
- [21] The arbitrator concluded that the only misconduct she was guilty of was of conducting herself in an improper and unacceptable manner and therefore was only guilty of the second charge.
- [22] On the question of how Ceki's association with a known criminal affected the employee-employer trust relationship, the arbitrator noted the evidence of the officer commanding the police station, who was concerned that she was in a relationship with a known criminal, and that she had taken measures to prevent Ceki having access to certain information. The

arbitrator found Ceki's version that she had no knowledge of her boyfriend's doings highly unlikely and that her conduct had affected the employer-employee relationship. Nonetheless there was no evidence that Ceki had attempted to conceal or hide evidence by taking the cell phone. Accordingly, even though Ceki's conduct was improper, she could not conclude that the trust relationship was irreparably broken.

- [23] In addition, the arbitrator considered that Ceki had 5 years' service and had a clean disciplinary record, and her conduct had caused no harm to SAPS. Moreover, she continued to work for SAPS while the investigation was continuing. Accordingly, she reinstated Ceki limiting her backpay to twelve months remuneration and subject to her being issued with a final written warning for acting in an improper, disgraceful and unacceptable manner by attempting to take the cell phone of a suspect without permission.

Grounds of review and evaluation

- [24] Firstly, SAPS contends that the arbitrator misconstrued the charge of harming the interests of the SAPS under Disciplinary Regulation 5(3)(b)(i). It is not a requirement of the charge to prove that harm was actually caused, because the misconduct is described in the Regulation thus:

"An employee shall be guilty of misconduct if he or she performs any act or fails to perform any act with the intention to cause harm to or prejudice the interests of the Service, be it financial or otherwise."

SAPS points out that the arbitrator did not consider the question of whether Ceki acted with the necessary intent when she acted as she did in attempting to retrieve a suspect's cell phone. This was central to the charge. It argues that such conduct was intended to hamper police investigations, noting that Ceki herself acknowledged that cell phones are used to gather information in the investigation of cases.

- [25] Taken together with the evidence the arbitrator accepted, namely that Ceki was not present at the station in the performance of her work and had

insinuated herself into the company of the police and the suspects, and was persistent in her attempt to obtain a suspect's cell phone, the arbitrator would have been compelled to interpret that Ceki's conduct was committed for the improper purpose mentioned. It is noteworthy that the arbitrator also felt she had to determine if the SAPS had shown that, on this occasion, the cell phones did in fact yield incriminating evidence. That is a question quite irrelevant to the determination of Ceki's intent and consequently her guilt on the first charge.

- [26] It follows that because the arbitrator misconstrued the first charge, she failed to consider a core element of the charge. Had she not made this error, she would have been compelled to find that Ceki most probably acted with the improper motive in mind and was guilty of that charge.
- [27] Secondly, SAPS argues that the arbitrator's reasoning about whether Ceki had attempted to provide an alibi for the suspects was contradictory and unsustainable. On the one hand she had accepted it was highly likely that Ceki had told Williams that the suspects could not have been involved in the ATM robbery as their vehicle was in a different location during the whole of the day in question. Despite this, she still dismissed the suggestion that Ceki was attempting to create an alibi for the suspects. She arrived at this conclusion by reasoning that because Williams could not prove the suspects were involved in the robbery and Ceki's statement about the whereabouts of the vehicle was not shown to be false, Ceki could not be accused of providing a false alibi for the suspects.
- [28] Although it is an inescapable inference that what Ceki told Williams was clearly intended to demonstrate the suspects did not commit the robbery in question and that, by raising this with Williams, she was trying to assist the suspects, it does not follow that what she said necessarily amounted to a false alibi. As potentially exculpatory information it was something that was relevant to the investigation and it was not inherently improper of her to mention it even if it was information which favoured the suspects. Consequently, it was not untenable of the arbitrator to find she was not guilty of tendering a manufactured alibi in the absence of evidence that it was probably a false one.

- [29] Thirdly, SAPS contends that in the light of Ceki's persistent efforts to retrieve a cell phone from her boyfriend on the day of his arrest, the only reasonable inference that could be drawn is that her efforts to obtain the cell phone must have been because she was attempting to prevent it being used as a source of evidence. Her position as the secretary of the commanding officer where she might gain access to sensitive information was also a factor which the arbitrator failed to consider in evaluating Ceki's fitness to retain her job. Taking these considerations into account, SAPS argues that the arbitrator's decision that it would not be intolerable to retain Ceki is one that cannot be reasonably justified.
- [30] The evidence showed that Ceki used her position as a staff member at the station, to gain access to the suspects and to try to prevent her boyfriend's cell phone from being retained by the investigators. Had she succeeded, the consequence would have been inimical to the investigation and obviously amounted to an attempt to interfere with it. Ceki showed no remorse for her conduct. The officer commanding had to take steps to prevent Ceki having access to sensitive information, so even though she was not suspended pending the disciplinary action, it was necessary to take additional measures to address the lack of trust which had developed. Where it was deemed necessary to take special measures to prevent Ceki having access to sensitive information, it is clear the trust the officer commanding had in her secretary was broken. How the trust between employer and employee could be said to have been maintained in those circumstances is difficult to fathom. The arbitrator's finding that the trust relationship remained intact, if 'tarnished' had no foundation in the evidence.
- [31] On the basis of the discussion above, the arbitrator's conclusion that it was unfair to dismiss Ceki was one no reasonable arbitrator could have arrived at on the evidence before her.

Order

1. The Applicant's late filing of the review application is condoned.

2. The Applicant must pay the Third Respondent's costs of opposing the condonation application.
3. The finding of the Second Respondent in arbitration award no PSSS674-19/20, issued on 16 May 2022, that the Third Respondent's dismissal by the Applicant was substantively unfair as well as the consequential relief awarded in paragraphs 49 and 50 of the award are reviewed and set aside.
4. The finding of the Second Respondent that the Third Respondent's dismissal was substantively unfair is replaced with a finding that the Third Respondent's dismissal was substantively fair.



R Lagrange

Judge of the Labour Court of South Africa.

Appearances

For the Applicant

Q Mavongo instructed by State Attorney
Cape Town

For the Third Respondent

C May from BDP Attorneys